IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT, DIVISION OF ENVIRONMENTAL QUALITY, Plaintiff, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL REGAN, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Defendants.	Civil Action No. 4:22-cv-359 (BSM)

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice

SARAH IZFAR
Attorney
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0490
Sarah.izfar@usdoj.gov

Local Counsel:
SHANNON S. SMITH
Chief, Civil Division
U.S. Attorney's Office
Ark. Bar No. 94172
P.O. Box 1229
Little Rock, Arkansas 72203
Tel. (501) 340-2628
shannon.smith@usdoj.gov

Of Counsel:
JESSICA ZOMER
Office of General Counsel
RENEA RYLAND
Office of Regional Counsel, Region 6
U.S. EPA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

INTRODUCTION

Defendants U.S. Environmental Protection Agency ("EPA") and Michael Regan, in his official capacity as the Administrator of EPA, respectfully submit this reply brief in support of EPA's motion to dismiss ("Def. Br.") under Federal Rule of Civil Procedure 12(b)(1) and (b)(6). ECF No. 17. The Court should grant EPA's motion to dismiss because the claims asserted by Plaintiff Arkansas Department of Energy and Environment, Division of Environmental Quality ("DEQ") are not ripe, infringe upon the Eighth Circuit's future jurisdiction, and because DEQ has failed to state a claim under the Administrative Procedure Act ("APA"), which requires final agency action.

In its response brief, ECF No. 20 ("Pl. Resp."), DEQ misunderstands EPA's fundamental argument, which is that *even if* EPA's objection letters exceed its authority, this Court lacks jurisdiction over DEQ's claims. If EPA, at the conclusion of the statutorily prescribed administrative process, issues or denies a permit under the National Pollutant Discharge Elimination System ("NPDES") to the facilities at issue in this case, all of DEQ's claims, *including* those that EPA has exceeded its authority by sending objection letters, could be raised at the appropriate time exclusively in the U.S. Court of Appeals for the Eighth Circuit. If, however, EPA withdraws its objections during the administrative process, or the administrative process otherwise leads to a resolution of EPA's substantive claims, authority over the permits would never transfer to EPA, and it is unclear whether DEQ would still have any live claims. And, other than additional delay from a permit process that has already experienced considerable delay not attributable to EPA, it is unclear what hardship DEQ would face from continued participation in the pending administrative proceedings. Thus, DEQ's claims are neither fit for review nor would DEQ suffer undue hardship from completing the CWA's administrative

process for EPA's review of state NPDES permits. The Court should reject DEQ's request for premature, piecemeal judicial review.

Completing the administrative proceedings does not put "the cart before the horse," as DEQ asserts. Pl. Resp. 1. Rather, EPA asks this Court to keep the horse and cart intact, as contemplated by the CWA's statutory and regulatory provisions for reviewing proposed state permits. DEQ has asserted its claims prematurely and in the wrong court, and the Court should grant EPA's motion to dismiss the action.

STANDARD OF REVIEW

DEQ states that the "standard of review is highly relevant here," Pl. Resp. 20, but focuses entirely on the plausibility standard under Fed. R. Civ. P. 12(b)(6) and does not address the standard of review under Rule 12(b)(1), which does not require this Court to accept the Complaint's allegations as true when evaluating a factual attack on jurisdiction. *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018). Further, even under Rule 12(b)(6), the Court need not accept legal conclusions couched as factual allegations nor conclusory allegations unsupported by facts. *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Thus, the Court need not accept DEQ's conclusory allegations that EPA's objection letters constitute final agency action under the APA, Compl. ¶¶ 73, 79, 95, 101, and may evaluate the actual contents of the letters and the statutory framework prescribed for addressing the letters.

ARGUMENT
THE COURT SHOULD DISMISS FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM.

EPA's motion to dismiss asserted that the Court should dismiss for lack of jurisdiction and failure to state a claim because the parties are mid-way through an administrative process designed to resolve objections to proposed permits. Def. Br. 18–24. DEQ's response to the motion to dismiss boils down to one primary argument: granting the motion to dismiss requires

the Court to make a determination, on the merits, that EPA's objection letters were timely issued because the December 2021 permits were proposed instead of final. Pl. Resp. 20. ("Defendants have not raised pleading deficiencies, but rather a merits issue—i.e., whether EPA's objection letters were timely issued—that is improper for final resolution at this stage."). But the entire premise of EPA's motion to dismiss is that no merits determinations are proper until there is further factual development and final agency action. Def. Br. 18–28. EPA acknowledges that the administrative process contemplated by Section 1342(d) of the CWA and 40 C.F.R. § 123.44 relates to proposed permits, but completing this administrative process before judicial review of DEQ's claims does not preclude DEQ from asserting its claims in the administrative hearing or, as appropriate, in the Eighth Circuit, if EPA issues or denies a permit. As explained further below, DEQ's claims are not purely legal nor as easily resolved as DEQ has suggested, and DEQ has not sufficiently articulated what undue hardship it would suffer from delayed adjudication.

I. DEQ's Claims Improperly Infringe upon Future Circuit Court Jurisdiction.

DEQ does not directly address the principle established by *Telecomm. Rsch. and Action Ctr. (TRAC) v. FCC,* that "any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals." 750 F.2d 70, 75 (D.C. Cir. 1984). The Eighth Circuit has cited *TRAC* with approval. *See Automated Matching Sys. Exch., LLC v. U.S. Sec. & Exch. Comm'n*, 826 F.3d 1017, 1024 (8th Cir. 2016).

Instead, DEQ contends that the CWA does not preclude judicial review of its claims, which it incorrectly characterizes as "wholly collateral to the administrative and judicial review provisions in the CWA." Pl. Resp. 27 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010)). DEQ's reliance on *Free Enterprise Fund* is misplaced. In that case, the Supreme Court considered a statutory provision in the Sarbanes-Oxley Act and held that the

provision did not expressly limit judicial review in district court because there was no "statutory scheme" that displayed a "fairly discernible" intent to limit jurisdiction as to plaintiff's general, constitutional challenge. *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). Here, there is a "statutory scheme" that directly applies to the objection letters that DEQ challenges. The CWA "enumerates seven categories of EPA actions for which review lies *directly and exclusively* in the federal courts of appeals." *See Nat'l Ass'n of Mfrs. v. DOD*, 138 S. Ct. 617, 623 (2018) (emphasis added). In particular, the CWA "grants courts of appeals exclusive and original jurisdiction to review any EPA action 'in issuing or denying any permit under section 1342.'" *Id*. at 631 (quoting 33 U.S.C. § 1369(b)(1)(F)). Section 1342(d) of the CWA and the related regulations in 40 C.F.R. § 123.44 establish the "statutory scheme" for review of and objection to state permits and the possible subsequent issuance or denial of a final permit by EPA. DEQ's claims that EPA's objection letters exceed EPA's authority are therefore encompassed by this statutory scheme. Because these objection letters were issued pursuant to Section 1342(d) of the CWA and 40 C.F.R. § 123.44, DEQ must wait to raise any challenges to EPA's permitting actions in the Eighth Circuit, and only if and when EPA makes a final permit decision.

DEQ also fails to grapple with the real possibility that a ruling here could interfere with the Eighth Circuit's potential future jurisdiction. Any ruling on the validity of the objection letters in this suit may affect the Eighth Circuit's future jurisdiction. Should the Court conclude that EPA's objection letters exceeded its authority, that ruling would foreclose the Eighth Circuit's future jurisdiction by cutting off the administrative process and preventing EPA from ever issuing a final decision on a permit. Conversely, should the Court conclude that EPA's

objection letters were validly issued, that ruling could also interfere with the Eighth Circuit's review of a final permit decision.

Moreover, DEQ incorrectly asserts that its claims do not require the Court to address the substance of EPA's objections. The Complaint expressly alleges that "EPA's claim that the final permit is materially different and less protective than the draft permit is arbitrary and capricious" in part because "EPA's claim is also based on an unlawfully promulgated effluent limitation." Compl. ¶ 76; *see also id*. ¶ 98. Contrary to DEQ's position, this allegation does indeed raise a "technical dispute over the substance of EPA's objections." Pl. Resp. 27. DEQ admits as much in its response. *Id*. at 29 ("DEQ asserts that EPA acted arbitrarily in declaring the final permits to be proposed based, in part, on its attempt to force its illegal effluent limitations into DEQ's permitting process.")

EPA has identified only one instance in which a district court followed a path similar to what DEQ seeks here, and even there, the district court considered only the narrow question of whether EPA clearly exceeded its authority. *See Champion Int'l Corp. v. EPA*, 850 F.2d 182, 186 (4th Cir. 1988).[1] In so doing, the court took only a "cursory" look at the merits to determine whether EPA was acting "clearly beyond the boundaries of its authority." *Id*. However, the Court should not employ a similar approach here. *Champion* did not consider or discuss *TRAC* and the principle that the Circuit Court has exclusive jurisdiction to hear challenges that might affect its future review of the issuance or denial of any federal NPDES permit. Further, since *Champion*, *Nat'l Ass'n of Mfrs.* has made clear that exclusive review of final permit decisions

[1] Notably, in *Champion*, the court upheld EPA's decision to treat purportedly final permits as proposed. 850 F.2d at 184. In that case, the state issued purportedly final permits, which EPA then viewed as proposed because the state was required to submit a proposed permit under the CWA and the applicable memorandum of agreement. *Id*.

lies in the Circuit Court of Appeals. 138 S. Ct. at 623, 628–33. As the reasoning in *TRAC* holds, even when it comes to a determination of whether EPA's actions under 33 U.S.C. § 1342 are *ultra vires*, the district court should dismiss for want of jurisdiction.[2]

Dismissal here would not "foreclose all meaningful judicial review." *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 212–13). If EPA does not withdraw its objections to either of these permits and ultimately makes a final permit decision under the CWA's statutory scheme, the Eighth Circuit would have exclusive jurisdiction to review EPA's actions in issuing the permit, and DEQ may then raise challenges, including, as appropriate, those pertaining to EPA's actions taken during the CWA permitting process under 33 U.S.C. § 1342. Therefore, this Court should dismiss for lack of jurisdiction to avoid interfering with the Circuit Court's future potential jurisdiction to review any issuance or denial of a permit by EPA.[3]

II. DEQ's Claims Are Not Ripe.

A. DEQ's Claims Are Not Fit for Judicial Review.

The ripeness doctrine exists precisely to prevent courts from wading into fact patterns like this one, which are overly complicated because they are incomplete. DEQ's claims are not easily resolved at this juncture and further administrative process and final agency action will help crystallize the parties' positions.

---

[2] If the Court denies EPA's motion to dismiss, a "cursory look at the merits" will demonstrate that EPA was not acting clearly beyond the boundaries of its authority. As addressed in EPA's response to DEQ's motion for a preliminary injunction, the comments submitted by Oklahoma state agencies on the two permits easily qualify as significant, thereby authorizing EPA's review of the December 1, 2021 permits as proposed permits. Def. Br. 29–32.

[3] EPA's position here aligns with its position on administrative exhaustion, which is required because there is a statutory "scheme of administrative review, followed by judicial review of final orders in the appropriate federal appeals court." *Great Plains Coop v. Commodity Futures Trading Comm'n*, 205 F.3d 353, 355 (8th Cir. 2000).

1. A Reviewing Court Would Benefit from Additional Factual Development.

In order to convince this Court to cut short the administrative process, DEQ insists that this case presents a simple question of law that can be decided now without addressing the merits of EPA's objections, but the administrative proceedings on EPA's objections will provide much needed additional factual development. As an initial matter, DEQ elides the crux of the dispute between the parties—whether DEQ was required to submit proposed permits. DEQ repeatedly mischaracterizes EPA's objections as "hundreds" of days late, seemingly to suggest that EPA's objections were directed toward the *draft* permits. *See, e.g.*, Pl. Resp. 3. Yet EPA's objections make clear that they were directed toward the December 2021 permits, which EPA views as proposed because—following DEQ's initial submission of the draft permits—DEQ was required to submit proposed permits to EPA for review pursuant to the CWA, related regulations, and the Memorandum of Agreement ("MOA") (Maguire Decl. Ex. F, ECF No. 17-1 at 56–119). Of note, DEQ does not allege that EPA's objections to the December 2021 permits would have been untimely if those permits were proposed permits. EPA has never contended that it objected to the draft permits, and whether EPA did so has no bearing in this case on whether DEQ was required to submit proposed permits to EPA for review.[4] Had EPA objected to the draft permits, an additional reason would exist for DEQ to submit a proposed permit for EPA to review under

[4] References to the "statutory review period" are similarly misleading. Pl. Resp. 22. There is no *statutory* review period for *draft* permits, only proposed permits. *See* 33 U.S.C. § 1342(d)(2) and the related regulation at 40 C.F.R. § 123.44(b), which refer to *proposed* permits, not draft permits. Under 40 C.F.R. § 123.44(j), EPA may agree in an MOA to review draft permits rather than proposed permits, but it is the MOA, and not the CWA, which allows DEQ to send draft permits to EPA for review and which establishes the timeline for such review. *See* MOA, Section 3.B.7, Maguire Decl, Ex. F, ECF No. 17-1 at 56–119. And, under 40 C.F.R. § 123.44(j) and the MOA, Section 3.B.11, DEQ must submit proposed permits under certain circumstances, present here, even if EPA reviewed and did not object to the draft permit. Those *proposed* permits are subject to the "statutory review period" to which DEQ alludes.

40 C.F.R. § 123.44(j). The failure to object to the draft permits, however, does not vitiate the other text in 40 C.F.R. § 123.44(j), which requires a proposed permit if there are significant comments or if the proposed permit differs from the draft permit. DEQ's repeated refrain that EPA's objections are "hundreds of days" late is therefore misleading and irrelevant.

More importantly, DEQ's claim that the Court need not "wade into complex, technical questions surrounding appropriate levels of pollutants" to determine "whether EPA's objections were timely within the confines of its authority" lacks merit. Pl. Resp. 2. First, as addressed above, *supra* Argument I, DEQ alleges that EPA set an unlawful effluent limitation, which would require consideration of EPA's substantive objections. Second, even to determine whether DEQ was required to submit a proposed permit for EPA's review, the Court must consider, among other things, whether significant comments on the permits were received and whether the draft permits differed from the proposed permits.[5] 40 C.F.R. § 123.44(j). These determinations are intertwined with EPA's substantive objections and thus will be further developed during the pending administrative proceedings.

DEQ acknowledges that the "Court's analysis of the term 'significant' may depend in part on whether the public comment letters raise sufficient factual or legal issues to trigger continued EPA involvement," Pl. Resp. 23, but asserts, without any basis, that the administrative process "would not develop further facts that would aid the Court in the threshold question before it." *Id*. 24. To the contrary, EPA's objection letters, which address the correct total

[5] Contrary to DEQ's assertion, EPA did not waive the argument that the draft permits differed from the proposed permits, nor that the draft permits were less stringent. EPA merely stated that, for the purposes of DEQ's motion for a preliminary injunction, the Court may conclude that DEQ fails to establish a likelihood of success on the merits because it plainly received significant comments to the draft permit. Def. Br. 29 n.10. Should the Court deny EPA's motion to dismiss, EPA reserves the right to assert these arguments during merits briefing.

phosphorous effluent limitations required under the CWA for the permits, were informed by the comments received from various Oklahoma state entities. EPA contends that these comments were significant as they raised questions directly relating to the level of phosphorous the facilities could discharge without contributing to the exceedance of downstream water quality standards. *Compare* comments from Oklahoma state entities, Maguire Decl., Exs. B, C, D, H, ECF No. 17-1 at 42–53, 148–157, *with* EPA's objections, addressing total phosphorous effluent limitations, York Decl. Exs. G, M, ECF Nos. 4-7, 4-13. DEQ's claim that some of *those* comments were resolved does not diminish their significance. The comments raised issues regarding the total phosphorous effluent limitation, a term in each permit, and triggered a response by EPA to further investigate the total phosphorous limitations in the December 2021 permits. *Id*.[6] EPA's substantive objections contend that the comments were not satisfactorily resolved because the total phosphorous effluent limitations do not comply with the CWA.[7] Def. Br. 31–32. These objections would be addressed during the administrative proceedings. Thus, the validity of EPA's objections is intertwined with the question of whether significant comments were received and whether DEQ was required to submit a proposed permit.

[6] The response triggered by the comment letters included EPA's September 28, 2021, letter to DEQ, seeking, among other things, additional information and further clarification as to how the draft permit limits were protective of water quality and not in violation of the CWA's backsliding prohibition. York Decl. Ex. E., ECF No. 4-5. Although DEQ did not officially respond to EPA's September 28, 2021, letter and did not inform EPA of its intent to issue the NACA permit on December 1, 2021, EPA incorrectly stated in the Declaration of Charles Maguire, ECF No. 17-1, that there was no further communication between EPA and DEQ between EPA's sending of the letter and DEQ's December 1, 2021, issuance of the permit. In fact, there were additional communications between EPA and DEQ regarding EPA's concerns with the draft NACA permit prior to DEQ's issuance of the December 1, 2021, permit, but these communications did not resolve EPA's concerns. EPA regrets the inadvertent error, and has annexed the Supplemental Declaration of Charles Maguire, Ex. 1, to correct the record.

[7] Under DEQ's carefully curated definition of "significant," DEQ seemingly acknowledges that had the comments *not* been resolved, they could be viewed as "significant." Pl. Resp. 10.

In addition, judicial review of DEQ's challenge would require the Court to prematurely and improperly consider the merits of EPA's objections to determine whether the draft permits and the proposed permits differ for the purposes of 40 C.F.R. § 123.44(j). EPA's explanation for why the draft and proposed permits are different relies, in part, on technical differences regarding how total phosphorous effluent limitations may be measured. *See* York Decl. Exs. G, M, ECF Nos. 4-7, 4-13. DEQ also contends that the December 2021 permits, which it claims are final permits, will improve the watershed and reduce total phosphorous in the Illinois River. Pl. Resp. 25. To resolve this claim, the Court would have to consider EPA's substantive objections, which call into question the validity of DEQ's calculations. *See* EPA's objections, York Decl., Exs. G, H, M, N, ECF Nos. 4-7, 4-8, 4-13, 4-14.

DEQ's attempt to distinguish this case from *Great Plains Coop* because DEQ is not seeking to "address" the substance of EPA's objections fails. *See* 205 F.3d at 355; Pl. Resp. 26. In that case too, the plaintiff alleged that the administrative process would be futile and yet the Eighth Circuit concluded that it was compelled to exhaust its remedies before bringing suit. *Id*. at 355–56. The court considered the exact argument that DEQ makes here—that the judiciary may determine the limits of statutory authority—and rejected it, concluding that "[t]he issue here is not *whether* the judiciary may determine if the [agency] exceeded the bounds of its power, but rather *when* the judiciary may make such a determination." *Id*. at 356.

2. Completing the Administrative Proceedings Would Not Be Futile.

In its motion to dismiss, EPA described in detail the administrative process for reviewing proposed state NPDES permits. Def. Br. 5–6. The process includes a hearing, following which EPA shall "reaffirm the original objection, modify the terms of the objection, *or withdraw the objection,* and shall notify the State of this decision." 40 C.F.R. § 123.44(g) (emphasis added).

DEQ is free to assert in the hearing that the objections are untimely. EPA's motion to dismiss in no way prejudged the outcome of the administrative process and acknowledged the possibility that its objections could be withdrawn following a hearing, as expressly contemplated by federal regulation. Def. Br. 21.

DEQ dismisses the possibility that EPA may withdraw its objections during the administrative proceedings. In doing so, DEQ fails to address why the continued participation in an administrative proceeding, at the end of which permitting authority might *not* transfer to EPA and the December 2021 permits would stand, is not relevant to this Court's ripeness inquiry. Contrary to DEQ's assertion, the facts here are more similar to those in *Great Plains Coop*, 205 F.3d at 353, than to *Monson v. Drug Enf't Admin*., 589 F.3d 952, 960 (8th Cir. 2009), in which the Drug Enforcement Agency cited to no "similarly exhaustive administrative appeal process." Here, as in *Great Plains*, "the administrative process was ongoing and the outcome was not foreseeable." *Id*. Moreover, in *City of Ames v. Reilly*, which shares even closer factual similarity to this case, the city also challenged EPA's objections to a proposed permit, in part, because the objections violated state sovereignty and exceeded EPA's authority. 986 F.2d 253, 256 (8th Cir. 1993). The court held that the city's challenge was "premature because it vitiate[d] the administrative process mandated by the [CWA]" and that the city "failed to exhaust its administrative remedies," leaving the court without its "statutorily provided jurisdiction to review the EPA's actions." *Id*. The court further noted that "[v]arious administrative opportunities still remain: the State could issue its own permit, the EPA could withdraw its objections, or the EPA could issue a final NPDES permit." *Id*. The same possibilities (and uncertainties) are present here.

Although EPA recognizes that DEQ's APA claims arise from its participation in a process designed for proposed permits, if EPA withdraws its objections during the administrative process, or the administrative process otherwise leads to a resolution of EPA's substantive claims (through a modification of objections), authority over the permits would never transfer to EPA, and DEQ's claims would be fully resolved. The possibility that the agency process may correct a potential error is one reason why the exhaustion requirement exists in the first place. "Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review." *Anderson v. Sullivan*, 959 F.2d 690, 693 (8th Cir. 1992) (citing *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975)); *see also Great Plains Coop v. Commodity Futures Trading Comm'n,* 205 F.3d at 353.

3. DEQ Fails to Challenge Final Agency Actions.[8]

DEQ's theory of finality illustrates why no final agency action has occurred. DEQ identifies not one but two interim steps in the review process, *both of which* DEQ claims are final agency actions. Pl. Resp. 21–22. First, DEQ contends that EPA "misapprehends the key dispute," which is whether "EPA waived its opportunity to object to the NACA and Springdale permits." *Id*. According to DEQ, these "waivers" are final agency actions because the "deadline to object to the draft permits has long since passed" and they had "immediate legal effect and consequences, as DEQ was authorized . . . to issue the final NACA and Springdale permits." *Id*. at 22. Yet, simultaneously, DEQ asserts that EPA's four objection letters also constitute final

[8] Although finality is an independent requirement to state an APA claim under Rule 12(b)(6), it is also intertwined with this Court's assessment of whether it has jurisdiction over a ripe claim and is therefore addressed here.

agency action in that they "impose additional administrative process that would only apply when EPA complies with its statutory timelines and procedures" and that "there is no additional agency decision-making process that would change EPA's determinations." Pl. Resp. 22–23. In both instances, DEQ's arguments fail and serve only to illustrate why the APA allows for judicial review of final agency action and not interim agency action.

As an initial matter, DEQ's references to a waiver in the MOA, Section III.B.9, have no relevance here. That paragraph of the MOA addresses the process for objecting to draft permits. But as addressed *supra* Argument II.A.1, no party contends that EPA objected to the draft permits. EPA contends that it has objected to proposed permits, and DEQ contends that EPA has improperly objected to final permits. Thus, the relevant MOA paragraph is Section III.B.11 and the relevant regulation is 40 C.F.R. § 123.44(j), both of which address the circumstances under which DEQ must subsequently submit a proposed permit following EPA's review of a draft permit. With respect to whether the purported "waivers" were final agency action, the Complaint does not contain any such allegation, and DEQ certainly does not seek judicial review challenging those "waivers." The Complaint challenges only EPA's objection letters. *See* Compl., Counts I-V.

In addition, neither of these purported agency actions constitutes the consummation of the *federal agency's* decisionmaking. *See* 5 U.S.C. § 704; *Bennett v. Spear*, 520 U.S. 154, 178 (1997). As addressed, EPA's failure to object to the draft permit is legally irrelevant in this action to whether DEQ was required to submit a proposed permit. And EPA's objection letters are an interim step in EPA's objecting to the proposed permits. Def. Br. 20–22. Additional steps remain before the objection process is complete.

DEQ does not meaningfully address the multiple Circuit Court cases, including an Eighth Circuit case, which have concluded that EPA's objections to proposed permits are not final agency actions, but instead are interim, non-dispositive steps, which are not subject to review at all. *See City of Ames v. Reilly*, 986 F.2d at 256; *see also S. Cal. All. of Publicly Owned Treatment Works v. EPA*, 853 F.3d 1076, 1081 (9th Cir. 2017); *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 875 (7th Cir. 1989); *Champion Int'l Corp. v. EPA,* 850 F.2d at 188. Instead DEQ dismisses these cases as irrelevant because it claims that under Rule 12(b)(6), the Court must presume that the factual allegations in the Complaint are true, and the December 2021 permits are final. Pl. Resp. 3, 20–21. Rule 12(b)(6), however, does not prevent the Court from considering the applicable statutory and regulatory scheme. In *City of Ames*, the City made similar allegations that EPA's objections violated state sovereignty and exceeded EPA's authority, and the court dismissed for lack of jurisdiction because EPA had not yet issued or denied an NPDES permit. 986 F.2d at 256. And in *S. Cal. All. of Publicly Owned Treatment Works*, the plaintiff also alleged that EPA exceeded its authority in its objection letter, but the court dismissed for lack of jurisdiction in part because, under the CWA's statutory and regulatory scheme, the objection letters were a preliminary, interim step in an incomplete administrative process. 853 F.3d at 1080, 1086. The Court should dismiss here on the same grounds.

B. Delaying Review Would Not Impose Undue Hardship.

DEQ asserts that because its claims are purely legal, they are ripe for review now, and it would suffer hardship if forced to participate in an administrative process that could take months. Pl. Resp. 24–25. Yet, DEQ acknowledges that these permits have been administratively

continued for years under DEQ's purview, before EPA was even provided a draft permit for review. *Id*. 20.

DEQ further claims that participating in an administrative process that it deems illegitimate would cause additional hardship because the process itself presumes that the December 2021 permits are proposed, which interferes with DEQ's authority. Pl. Resp. 24. However, as addressed in EPA's motion to dismiss, the "scrutiny of an individual permit of course has but limited effect on the state NPDES program as a whole." *Save the Bay v. EPA*, 556 F.2d 1282, 1296 n.15 (5th Cir. 1977).

Moreover, even though the hearing process is intended for proposed permits, nothing precludes DEQ from asserting that EPA's objections are illegitimate or untimely in the administrative hearing, and the administrative process contemplates that EPA may withdraw its objections. And, DEQ may pursue these claims in the Eighth Circuit, if authority over the permits transfers to EPA and a final permitting decision is issued. *See Atl. States Legal Found., Inc. v. EPA*, 325 F.3d 281, 285 (D.C. Cir. 2003).

DEQ does not dispute that, at present, the administratively continued permits contain the same total phosphorous effluent limitations as those contained in the December 2021 permits. *See* Def. Br. 22–24. Although DEQ now submits new declarations from the wastewater treatment facilities about "potential differences in effluent limitations" in the future, Pl. Resp. 24, the Ward Declaration makes no such allegations but alleges that the delay caused by completing the administrative process will delay Springdale Water Utilities' construction plans and could potentially increase customer rates. ECF No. 24. But as DEQ acknowledges, this permit had been administratively continued for thirteen years before DEQ purported to reissue the permit in December 2021. Pl. Resp. 24–25. This delay is not attributable to EPA. The delay of additional

months, to fully complete a statutorily prescribed administrative process designed to ensure the permit's compliance with the CWA, does not materially increase the delay already experienced by the facility and the affected community.

The Neil Declaration makes similar allegations as to the Northwest Arkansas Conservation Authority ("NACA") permit, ECF No. 23, but also alleges that the administratively continued permit precludes NACA from receiving effluent from Cave Springs because it allows for a lower design flow of 3.6 million gallons per day as opposed to the 7.2 million gallons per day allowed under Tier II limitations. DEQ and NACA both acknowledge that such expansion cannot even take place until NACA demonstrates that any increase in phosphorous loading to the Illinois River watershed would be fully offset. Pl. Resp. 19; Neil Decl. ¶ 24, ECF No. 23. While NACA claims that it can make this demonstration by connecting to Cave Springs, whether this is true is the subject of EPA's objection letters, further illustrating why DEQ's claims are not ripe. *See* EPA's Jan. 21, 2022 specific objections to NACA permit, York Decl. Ex. H, ECF No. 4-8.

To the extent that DEQ alleges that it suffers unique harm because of its "sovereign status," which situates it differently from "another member of the public," Pl. Resp. 14, it cites no support for this proposition, and the case law suggests the opposite is true. *City of Ames* also involved a public entity and the court still required the city to exhaust its administrative remedies before bringing suit. 986 F.2d at 256. Neither EPA nor DEQ is above the law; both EPA and DEQ are bound by the requirements of the CWA and its regulations. Just as EPA must comply with the administrative process prescribed by the CWA, including scheduling the hearings that DEQ has requested, DEQ must also allow for completion of the pending administrative proceedings before bringing suit.

CONCLUSION

For the foregoing reasons, the Court should grant EPA's motion to dismiss.

Respectfully submitted,

Dated: June 17, 2022

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division

/s/ *Sarah Izfar*
SARAH IZFAR
Trial Attorney
Environmental Defense Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 305-0490
Sarah.izfar@usdoj.gov

Of Counsel:
JESSICA ZOMER
Office of General Counsel
RENEA RYLAND
Office of Regional Counsel, Region 6
U.S. EPA

Local Counsel:

SHANNON S. SMITH
Chief, Civil Division
U.S. Attorney's Office
Ark. Bar No. 94172
P.O. Box 1229
Little Rock, Arkansas 72203
Tel. (501) 340-2628
shannon.smith@usdoj.gov
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2022, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ *Sarah Izfar*